United States Court of Appeals

for the Second Circuit

APPELLANT'S SUPPLEMENTAL BRIEF

74-2073

In The

UNITED STATES COURT OF APPEALS

For The Second Circuit

In the Matter of

LAW RESEARCH SERVICE, INC.

Appellant.

On Appeal from the United States District Court for the Southern District of New York from the Order of Honorable Constance Baker Motley Affirming the Order of Asa S. Herzog Bankruptcy Judge, allowing the Secured Claims of John Herbert Crook

---

SUPPLEMENTAL BRIEF OF APPELLANT, LAW RESEARCH SERVICE, INC.

KRAUSE, HIRSCH & GROSS
Attorneys for Appellant
Special Counsel
Ellias C. Hoppenfeld
P.O. Box 125
Scarsdale Station
Scarsdale, New York 10583
914-723-4210

3

TABLE OF CONTENTS

Supplemental Brief

	Page
Preliminary Statement	1
Proceedings Below	2
Questions Presented	6
Point I. The Bankruptcy Court did not have jurisdiction to determine the secured claim of Crook.....	7
Conclusion	13

TABLE OF CITATIONS

Cases Cited

	Page
Central Hanover Bank & Trust Co. v. Kelly, 133 F. 2d 873, (2d Cir. 1941)	10
In the Matter of Oceana International, Inc. 376 F. Supp. 956 (S.D.N.Y. 1974)	8
In re Martin Custom Made Tires Corp., 108 F. 2d 172, (2d Cir. 1939)	12
In the Matter of H.R. Weissberg Corp. 458 F. 2d 975, 977 (7th Cir. 1972)	10
In re WNCN, 246 F. Supp. 30 (S.D.N.Y. 1965)	9
In the Matter of Law Research Service, Inc., debtor-appellee, Alton W. and Evelyn K. Hemba, claimant-appellants, #41394	5,7,9,10 11,12
Kaplan v. Gutman, 217 F. 2d 481, (9th Cir. 1954)	11
Smith v. Chase Nat'l Bank, 84 F. 2d 608, (8th Cir. 1936)	10
Sylvan Beach, Inc. v. Koch, 140 F. 2d 856, (8th Cir. 1944)	10
Texas Consumer Finance Corp. v. First National Bank, 365 F. Supp. 427 (S.D.N. Y. 1973)	11
United States ex rel. Emanuel v. Jaeger, 117 F. 2d 483, (2d Cir. 1941)	10

Statutes Cited

Chapter XI Sections SS 367 through 370, 11 U.S.C. SS 767-770	8
Bankruptcy Act, Section 2 (a) (7) 11 U.S.C. S 11 (a) (7) (1970)	10

CITATIONS

Page

Other References

Advisory Committee's Note to Bankruptcy Rule 915 10

Collier on Bankruptcy, Special Supplement on Rules of Bankruptcy Procedure at 247-49 (14th ed. 1974) 11

Collier On Bankruptcy 2.09 at 178 (14th ed. 1974)..... 10

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x

In the Matter of

LAW RESEARCH SERVICE, INC., DOCKET #74-2073

Appellant

- -x

SUPPLEMENTAL BRIEF OF APPELLANT, LAW RESEARCH SERVICE, INC.

PRELIMINARY STATEMENT

This supplemental brief is submitted by appellant, Law Research Service, Inc. ("Law Research"). On an appeal from an order by Judge Constance Baker Motley* dated June 28, 1974 affirming the order of Bankruptcy Judge Asa S. Herzog** dated November 12, 1973 which overruled objections of Law Research to a secured claim filed in these proceedings by John Herbert Crook ("Crook") in the sum of $25,923.65 with interest of 8 percent to the date of payment.

---

*Hereinafter referred to as Motley D.J.
**Hereinafter referred to as Herzog B.J.

PROCEEDINGS BELOW

Prior to initiating the Chapter XI proceedings below, Law Research was in the business of providing attorneys with legal materials which it maintained on a computer owned and operated by Western Union Telegraph Company of New York. In 1966 Law Research contracted to provide Crook with exclusive distributorship rights to its service in the Austin, Texas area.

Western Union subsequently withdrew the use of its computer and Law Research was unable to perform its duties under the franchise contract. Crook commenced proceedings in the Texas state courts against Law Research claiming that he had been induced to purchase the franchise by fraudulent misrepresentations and claimed damages and at approximately the same time Law Research began a seperate suit against Western Union.

While the Western Union action was pending and before a trial could be had in the Texas court Law Research and Crook began settlement negotiations based upon Law Research's expectations of recovery in its suit against Western Union.

The settlement agreement reached provided that Crook was to receive $25,923.65 representing $15,500.00 paid by Crock for his franchise and $10,423.65 expended by him in reliance on the franchise

(4a -1-3)* these being the items of his alledged out of pocket damages claimed by him in the Texas law suit and Law Research would deliver an assignment in the amount of $25,923.65 of "any sums recovered or paid therefrom or thereon whether by settlement, compromise, execution, or otherwise." (4a - 2).

Upon full satisfaction and payment of said assignment before May 31, 1970, Crook agreed to discontinue the action and the parties would exchange general releases. (4a - 3).

Law Research did issue an assignment similtaneously with the execution of the settlement.

In December of 1970, Law Research commenced an action in the New York Supreme Court for specific performance of the settlement agreement against Crook alledging Crook refused to accept payment under the settlement agreement, and refuses to supply Law Research with a general release. That suit is still pending in the New York Supreme Court.

Law Research won a judgement in its suit against Western Union which was on appeal when Law Research filed a petition for Chapter XI arrangement on June 18, 1971.

In order to assure effectuation of an arrangement, debtor in April, 1972 settled the Western Union appeal with

---

* The first number in Brackets refers to number assigned documents in appendix index; the succeeding numbers are to appendix page numbers.

the approval of the Bankruptcy Court. According to this settlement, part of the proceeds from Western Union were to be used to pay unsecured creditors under a plan of arrangement yet to be determined, and part was to be deposited in a special bank account for the purpose of satisfying the claims of debtor's secured creditors. In his order approving the settlement Bankruptcy Judge Herzog required that withdrawals from the special bank account be made only over his countersignature. Debtor and its unsecured creditors thereafter agreed upon a plan of arrangement, which was confirmed by the Bankruptcy Judge on June 20, 1972. The plan did not contain provision for retention of jurisdiction by the Bankruptcy Court after confirmation.

On July 6, 1972 the Bankruptcy Judge amended his order of confirmation to allow Law Research to file objection to "claims proved and filed but not allowed or disallowed herein prior to the date hereof." As a result of the amendment, debtor applied to reduce or expunge claims by creditors, by motion dated July 19, 1974, who asserted a security interest in its assets, and objected to Crook's claim on the grounds "claimed lien was not perfected; the alleged lien is voidable under Section 60 of the Bankruptcy Act; Claimant is not entitled to a lien under any circumstances; the assignment by the debtor to claimant is of no force and effect."

This motion dated July 19, 1972 included the Crook claim as well as the claim of Alton W. Hemba. Judge Werker on October 31, 1974 decided the Hemba claim in Law Research Service, Inc., debtor-appellee, Alton W. and Evelyn K. Hemba, claimant-appellants, #41394.

Crook had filed a secured claim number 502 on July 18, 1972, (2a-1-2) after the confirmation of the plan of arrangement on June 20, 1972.

The motion was heard on October 31, and concluded on November 6, 1972.

Herzog B. J. overruled Law Research's objection and allowed Crook's claim as a secured claim. (5a-8) (6a- 15).

QUESTIONS PRESENTED

1. Did the Bankruptcy Court have jurisdiction to determine the secured claim of Crook where the plan of arrangement did not provide for retention of jurisdiction after confirmation?

POINT I

THE BANKRUPTCY COURT DID NOT HAVE JURISDICTION TO DETERMINE THE SECURED CLAIM OF CROOK.

in the proceedings below the parties sought a determination of the secured claim of Crook which was totally unrelated to Law Research's Chapter XI proceedings, its plan of arrangement, and the plan's benefit to creditors and the BAnkruptcy Court simply did not have jurisdiction to determine title.

The question of enforceability of the Crook secured claim is an issue having no proper relation to the business with which the Bankruptcy Court was entrusted because the plan of arrangement did not retain jurisdiction to determine secured claims.

In an opinion by Henry F. Werker D.J.* #41394 dated October 31, 1974 on an appeal by Alton W. and Evelyn K. Hemba, claimants-appellants the court found that Law Research's plan of arrangement did not retain jurisdiction to determine secured claims.

In the Crook claim as was the case in the Hemba claim, the claim was not timely filed prior to confirmation and is not affected by the arrangement. Werker D.J. at page 7 of his

---

* Hereinafter referred to as Werker D.J.

opinion set forth the law as well as his findings regarding Law Research's plan or arrangement when he stated:

> In In the Matter of Oceana International, Inc., 376 F. Supp. 956 (S.D.N.Y. 1974), on facts very similar to those of the case at hand, Judge Weinfeld found that the Bankruptcy Court lacked jurisdiction to determine a debtor's claim against a secured creditor after confirmation of its plan of arrangement. Briefly, the facts in that case were these: Having failed to devise a viable plan of arrangement, the debtor, Oceana, was adjudicated a bankrupt and deprived of its debtor in possession status. One of its creditors, a bank holding chattel mortgages, received permission from the Bankruptcy Court to sell the chattels at public auction. Subsequently, Oceana filed a second petition for arrangement which Judge Weinfeld found was "predicated essentially upon a claim that at the foreclosure sale the bank acquired and then sold . . . [property] . . . not subject to the chattel mortgage, and that a recovery of such property could result in a Plan of Arrangement." 376 F. Supp. at 958. When the petition was granted Oceana as debtor in possession began a summary proceeding against the bank to void the foreclosure sale.
>
> During this second arrangement proceeding Oceana was successful in establishing and confirming a plan of arrangement. The plan itself did not provide for retention of jurisdiction over the summary proceeding against the bank, but the Bankruptcy Judge in his order of confirmation provided for such continuation. When the bank moved to dismiss for lack of jurisdiction, however, the Bankruptcy Judge felt constrained to grant the motion. On appeal, the District Court upheld as "unassailable" the Bankruptcy Judge's decision that jurisdiction did not survive confirmation under any of the Chapter XI sections invoked by Oceana (SS 367 through 370, 11 U.S.C. SS 767-770).
>
> The sections of Chapter XI relevant in the Oceana case are equally determinative here. Section 367 provides that "upon confirmation

> of an arrangement . . . except as otherwise provided in sections 369 and 370 of this Act the case shall be dismissed." Section 368 allows retention of jurisdiction after confirmation if so provided in the plan of arrangement, provision not found in the LRS plan. Section 369 states only that the court "shall in any event retain jurisdiction" until the final allowance or disallowance of all claims "affected by" the arrangement which were timely filed but not allowed or disallowed prior to confirmation. As noted above, the Hemba-LRS claim in issue here was not timely filed prior to confirmation and is not "affected by" the arrangement. Lastly, S 370 provides for payment of any S 369 claims allowed after confirmation by the Bankruptcy Court. Clearly here, as in Oceana, none of these statutory provisions supports the exercise of Bankruptcy Court jurisdiction. Accord, In re WNCN, 246 F. Supp. 30 (S.D.N.Y. 1965).

Neither Law Research or Crook raised the question of jurisdiction in the courts below, although counsel for Crook in his brief before the Bankruptcy Court did question Law Research's status as a debtor in possession after confirmation of the plan of arrangement.

Werker D.J. was also faced with this question in the Hemba claim and held that although both parties may consent to jurisdiction the court below could not extend its jurisdiction by consent when the court stated at page 8:

> It could, of course, be argued that a secured creditor can by consenting confer jurisdiction on the Bankruptcy Court to determine the status of its claim after confirmation of the debtor's arrangement. It appears from the facts summarized above

that the Hembas did in fact consent to Judge Herzog's jurisdiction by moving to withdraw their jurisdictional affirmative defense. The relevant statutory provision on Bankruptcy Court jurisdiction is section 2 (a) (7) of the Bankruptcy Act, 11 U.S.C. S 11 (a) (7) (1970), which provides that the Court is vested with such plenary jurisdiction at law and in equity as will enable it to "cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided." It also states in a second clause that the Court can exercise summary jurisdiction in the same realm where the adverse party does not make timely objection.

Despite the broad language of S 2 (a) (7), the equitable jurisdiction conferred upon the Bankruptcy Court "is not such as would enable it to entertain a plenary suit in equity to adjudicate controversies having no proper relation to the business with which it is entrusted." 1 Collier on Bankruptcy ¶ 2.09 at 178 (14th ed. 1974). See also In the Matter of H.R. Weissberg Corp., 458 F. 2d 975, 977 (7th Cir. 1972); Sylvan Beach, Inc. v. Koch, 140 F. 2d 856, 861 (8th Cir. 1944); Central Hanover Bank & Trust Co. v. Kelly, 133 F.2d 873, 875 (2d Cir. 1943); United States ex rel. Emanuel v. Jaeger, 117 F.2d 483, 486 (2d Cir. 1941); Smith v. Chase Nat. Bank, 84 F.2d 608, 615-16 (8th Cir. 1936); In the Matter of Oceana, supra at 961. An examination of the Advisory Committee's Note to Bankruptcy Rule 915, entitled "Objection to Jurisdiction of Court of Bankruptcy," supports this limitation:

> Rule 915(a), implementing this [2(a) (7)] statutory provision, does not apply to the making of an objection to the jurisdiction of the court to adjudicate and administer the estate of an ineligible bankrupt. Nor does the rule apply to the making of an objection to the court's jurisdiction over a controversy that does not arise in the course of or relate to the administration

> of the estate of an adjudicated bankrupt or his discharge. * * * Rule 915 repeats the substance of the second clause of S 2(a)(7). The Rule does not purport to confer jurisdiction to the court . . . over any controversy of which the court does not have subject matter jurisdiction.

Collier on Bankruptcy, Special Supplement on Rules of Bankruptcy Procedure at 247-49 (14th ed. 1974) (emphasis added). Accord, Kaplan v. Gutman, 217 F.2d 481, 485 n.8 (9th Cir. 1954).

The jurisdiction of the Bankruptcy Court below was invoked by LRS to establish an arrangement with its unsecured creditors. It seems clear to this Court that the enforceability of the Rembas' secured claim is an issue having no proper relation to the business with which that Court was entrusted. Since the Bankruptcy Courts have only such limited subject matter jurisdiction as is conferred on them by statute, any consent to more extensive jurisdiction that might be inferred from the Rembas' actions below is of no effect.

He found that the Law Research plan clearly precluded a determination by the Bankruptcy Court of a secured claim when he stated at page 11:

> "In contrast, in the proceeding below the parties sought a determination totally unrelated to the debtor's Chapter XI proceeding, its plan of arrangement, and the plan's benefit to creditors. In such circumstances, though the property in dispute is in its possession and the parties give their consent, the Bankruptcy Court simply does not have jurisdiction to determine title. Cf. In the Matter of Oceana, supra at 961. See also Texas Consumer Finance Corp. v. First National City Bank, 365 F. Supp. 427 (S.D.N.Y. 1973), where District (now Circuit) Judge Gurfein found that jurisdiction as to secured claims existed in the Bankruptcy Court only because retention of jurisdiction and distribution of any post-confirmation recovery by the debtor were key provisions of the plan of arrangement.
>
> In this case appellee's unsecured debts

> were fully discharged when its plan of arrangement was confirmed below. Prior to confirmation, any recovery LRS gained from objection to the Hembas' claim could have been distributed to unsecured creditors as part of the plan of arrangement. Indeed, a debtor in possession under the Bankruptcy Act holds in trust and exercises its avoidance powers solely for the benefit of creditors. In re Martin Custom Made Tires Corp., 108 F.2d 172, 173 (2d Cir. 1939). Upon confirmation, however, where the debtor's plan as here provides neither for retention of jurisdiction nor for any retained interest for the benefit of creditors in the proceeds of a recovery, there is no basis for any distribution to creditors in the event debtor succeeds upon its claims, and thus, no way a determination of claims could contribute to effectuation of the debtor's plan of arrangement. In the Matter of Oceana, supra, at 962. The Bankruptcy Court consequently had no jurisdiction to decide the dispute as to the Hembas' secured claim."

Therefore, based on the findings of Werker D.J. regarding the lack of jurisdiction of the Bankruptcy Court to determine secured claims after the confirmation of Law Research's plan of arrangement, the decision of the Bankruptcy Judge should be vacated.

CONCLUSION

For the foregoing reasons, the order allowing Crooks claim as a secured claim should be vacated.

Respectfully submitted,

ELLIAS C. HOPPENFELD
Special Counsel to
Law Research Service, Inc.
P. O. Box 125
Scarsdale, New York 10583
914-723-4210

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Westchester) ss

Linda Kardian being duly sworn, deposes and says, I am not a party to this action and am over 18 years of age. On the 5th day of December, 1974, I served two copies of the within Supplemental Brief upon the following attorneys representing the following parties at their following respective addresses designated by said attorneys, by depositing a true copy of the same enclosed in a postpaid properly addressed envelope in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Attorneys	Address	Party
Richard L. Aronstein	275 Madison Avenue New York, New York	John Herbert Crook

Linda Kardian

Sworn to before me this
5th day of December, 1974

Notary Public

ALLAN C. [illegible]
Notary Public, State of New York
No. 31-[illegible]9725
Qualified in New York County
Cert. filed with N.Y. Co. Clks. Off.
Commission Expires March 30, 1975